

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

John Martin Henry, a Director or Officer of
Victoria Street Community Association
(" Henry ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/156

DATE OF DECISION: June 5, 2000

DECISION

OVERVIEW

This is an appeal brought by John Martin Henry (“Henry”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 18th, 2000 under file number 070122 (the “Determination”). By way of the Determination (which was issued pursuant to section 96 of the Act), Henry was ordered to pay Wanda Card (“Card”) the sum of \$2,670.38 on account of unpaid wages and interest.

BACKGROUND FACTS

Card is a former employee of the Victoria Street Community Association (“Victoria Street”), a nonprofit society. Ms. Card’s original unpaid wage complaint was dismissed by way of a determination issued on November 3rd, 1998. Ms. Card successfully appealed to the Tribunal and, in the end result, was awarded \$7,906.48 on account of unpaid overtime pay, vacation pay and compensation for length of service (see *Wanda Card*, B.C.E.S.T. Decision No. 123/99 issued March 23rd, 1999). This latter decision was confirmed on reconsideration (see *Victoria Street Community Association*, B.C.E.S.T. Decision No. 361/99 issued August 26th, 1999).

It would appear that Victoria Street has not paid any of the monies found to be owing to Ms. Card. Accordingly, the Determination now under appeal was issued as against Henry in his capacity as a director and officer of Victoria Street when some of Ms. Card’s unpaid wages, to use the language of section 96 of the Act, “were earned or should have been paid”. Section 96 states that corporate directors and officers--subject to certain exceptions--are personally liable for up to 2 months’ unpaid wages for each employee.

THE DETERMINATION

The relevant portions of the Determination, found at pp. 2-3, are reproduced below:

“Based on the evidence available from [the] Registrar of Companies, you were a Director or Officer of this company at the time these wages were earned or should have been paid.

The BC Online Registrar of Companies Corporate Search indicates that as of July 27, 1992 Victoria Street Community Association was incorporated. In a Notice of Changes of Director document dated May 13, 1998 it shows that [you] are listed as a Director/Officer. In minutes of Board Meetings dated April 14 and 27, 1998 it shows you as being on the Board of Directors. Wanda Card’s unpaid wages were earned between April 14, 1998 to May 9, 1998.

I have reviewed Section 45(1) (sic) of the Employment Standards Act Regulation which states:

(1) (sic) Section 96 of the Act does not apply to a director or officer of a charity who receives reasonable out-of-pocket expenses but no other remuneration for services performed for the charity.

...There is no doubt that Victoria Street Community Association is a Society however there is no evidence that the Association is a charity. [my italics]

To determine whether or not the operation is a charity I contacted Revenue Canada and they indicated that Victoria Street Community Association is not a registered charity.

From that information I find that you are not exempt from the liability incurred by the Association.

...Your liability is for the period April 14 to May 9, 1998 and the amount of the determination reflects the amount owing during that period of time. That amount is less than 2 months['] wages for Wanda Card.”

ISSUE ON APPEAL

Henry has raised several issues in his appeal documents (many of which are totally irrelevant), however, inasmuch as the appeal can be decided on a single ground, I propose to address only one issue, namely, whether or not the delegate correctly applied the section 45 regulatory exclusion.

ANALYSIS

The delegate concluded that Victoria Street was not a charity and evidently reached that conclusion on the basis of information provided to him by Revenue Canada. In that respect, the delegate may have been correct. However, the delegate does not appear to have considered the definition of “charity” found in section 1 of the *Employment Standards Regulation*:

“charity” means

- (a) a charity as defined in the *Income Tax Act* (Canada), or
- (b) a society incorporated under the *Society Act*;

An organization is a “charity” for purposes of section 45 of the *Regulation* if *either* of the above two alternatives is satisfied. Although the delegate concluded that Victoria Street was not a registered charity under the federal *Income Tax Act* the delegate *did* find (as evidenced by the italicized quote from the Determination, above) that Victoria Street was an incorporated society.

Of course, the regulatory exemption set out in section 45 applies only if the director or officer did not receive any remuneration from the charity other than reimbursement for out-of-pocket expenses. The Determination does not address the question of remuneration. Henry, for his part, suggests that he was not paid any remuneration beyond expenses and there is no evidence before me that contradicts his assertion. In this latter regard, it should be noted that the Director chose

not to file any submission with the Tribunal with respect to Henry's appeal although the Director was invited to do so by way of letter from the Tribunal Registrar dated March 16th, 2000.

Based on the material before me, I conclude that the delegate erred in finding that the section 45 regulatory exemption did not apply to Henry. In my view, Henry is insulated from any liability that might otherwise be imposed under section 96 of the *Act* and, accordingly, the Determination cannot stand.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be cancelled.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal